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Supreme Court, U.S.
FILED
JAN 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-65

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

PROVIDENCE JOURNAL COMPANY AND
CHARLES M. HAUSER

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN RESPONSE TO RESPONDENTS' MOTION TO DISMISS THE WRIT OF CERTIORARI

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TO DISMISS THE WRIT OF CERTIORARI

The Solicitor General respectfully moves for leave to file the attached brief for the United States as amicus curiae in response to respondents' motion to dismiss the writ of certiorari.

The petition for a writ of certiorari in this case was filed by private counsel who was appointed by the district court to "prosecute" charges of criminal contempt. Respondents now challenge the power of that court-appointed counsel to file the petition without the authorization of the Solicitor General. Re-

spondents contend that such authorization is required by 28 U.S.C. 518(a), which provides that except when the Attorney General otherwise directs in a particular case, the Attorney General and the Solicitor General shall conduct and argue cases in the Supreme Court "in which the United States is interested."

The question of the court-appointed attorney's authority to file the petition for a writ of certiorari was not raised in either the petition or the brief in opposition. We nevertheless addressed it, albeit only in a footnote, in the brief that was filed at the merits stage on behalf of the United States as amicus curiae on November 25, 1987. It was the footnote in our amicus brief that precipitated respondents' motion to dismiss the writ. Because we did not have an opportunity to answer respondents' arguments, and because those arguments directly concern the powers and duties of the Attorney General and the Solicitor General in cases before this Court, we request leave to filed the attached brief on behalf of the United States as amicus curiae in order to reply to respondents' motion.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JANUARY 1988

TABLE OF CONTENTS

	Page
Statement	2
Argument	5
Conclusion	18
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Anderson v. *Dunn*, 19 U.S. (6 Wheat.) 204 (1821)	8
Bloom v. *Illinois*, 391 U.S. 194 (1968)	9
Buckley v. *Valeo*, 424 U.S. 1 (1976)	7
Chandler v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970)	14
Confiscation Cases, 74 U.S. (7 Wall.) 454 (1868)	13
Gompers v. *Bucks Stove & Range Co.*, 221 U.S. 418 (1911)	8, 17
Gray Jacket, The, 72 U.S. (5 Wall.) 370 (1867)	13
ICC v. *Southern Ry.*, 543 F.2d 534 (5th Cir. 1976)	13
INS v. *Chadha*, 462 U.S. 919 (1983)	17
Pennsylvania Bureau of Correction v. *United States Marshals Service*, 474 U.S. 34 (1985)	9
Petition to Inspect and Copy Grand Jury Materials, In re, 735 F-.2d 1261 (11th Cir.), cert. denied, 469 U.S. 884 (1984)	12
Senate Select Committee on Presidential Campaign Activities v. *Nixon*, 366 F. Supp. 51 (D.D.C. 1973)	12
United States v. *Armstrong*, 781 F.2d 700 (9th Cir. 1986)	6
United States v. *McKenzie*, 735 F.2d 907 (5th Cir. 1984)	9
United States v. *Morales*, 566 F.2d 402 (2d Cir. 1977)	6

Cases—Continued: Page

United States v. *Squartino*, 778 F.2d 734 (11th Cir. 1985) 6
United States v. *Williams*, 622 F.2d 830 (5th Cir. 1980), cert. denied, 449 U.S. 1127 (1981) 6
United States v. *Wilson*, 421 U.S. 309 (1975) 8
United States v. *Winston*, 170 U.S. 522 (1898) 13
Will v. *Calvert Fire Ins. Co.*, 437 U.S. 655 (1978) 14
Will v. *United States*, 389 U.S. 90 (1967) 14
Young v. *United States ex rel. Vuitton et Fils S.A.*, No. 85-1329 (May 26, 1987) ..... *passim*

Constitution, statutes and rules:

U.S. Const.:
Art. II 8, 13
§ 3 7
Art. III 8, 9, 12
Amend. I 3
Freedom of Information Act, 5 U.S.C. 552 2
Judiciary Act of 1789, ch. 20, 1 Stat. 73:
§ 17, 1 Stat. 83 ..... 10, 11
§ 35, 1 Stat. 92 10
Act of Apr. 30, 1790, ch. 9, 1 Stat. 112 10
Act of Mar. 2, 1831, ch. 99, § 1, 4 Stat. 487-488 10
18 U.S.C. 401 ..... 6, 10, 11
28 U.S.C. 516 ..... 7, 12, 13
28 U.S.C. 516-519 7
28 U.S.C. 517 7
28 U.S.C. 518(a) ..... *passim*
28 U.S.C. 519 7
28 U.S.C. 547 7
28 U.S.C. 547(1) 12
28 U.S.C. 1254(1) 17
Fed. R. Crim. P.:
Rule 7(a) 6
Rule 42 7
Rule 42(b) 9, 10, 12

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN RESPONSE TO RESPONDENTS' MOTION TO DISMISS THE WRIT OF CERTIORARI

By motion dated December 16, 1987, respondents have moved to dismiss the writ of certiorari in this case on the ground that the Solicitor General did not authorize the filing of the petition for a writ of certiorari. Respondents contend that the Solicitor General's authorization was required by 28 U.S.C. 518 (a), which provides that, except when the Attorney General otherwise directs in a particular case, the

Attorney General and the Solicitor General shall conduct and argue all cases in this Court in which the United States is interested.

Respondents are correct that the Solicitor General did not authorize the filing of the petition for a writ of certiorari in the instant case. However, as we have stated in the brief filed on behalf of the United States as amicus curiae (at 2 n.2), it is our view that 28 U.S.C. 518(a) and related statutes do not mandate that the Attorney General and Solicitor General exercise control over those matters—such as the contempt proceedings initiated by the district court in this case—that are internal to the Judicial Branch.

STATEMENT

On November 14, 1985, Raymond J. Patriarca, Jr., the plaintiff in the underlying civil litigation, filed a motion to adjudge respondents in contempt for violating a temporary restraining order barring publication of materials that respondents had obtained from the Federal Bureau of Investigation pursuant to the Freedom of Information Act, 5 U.S.C. 552 (J.A. 223-225). The district court chose not to ask the United States Attorney to pursue the allegations of contempt because the FBI and Department of Justice were parties to the underlying proceeding (Pet. App. A5). In addition, the private attorney for plaintiff Patriarca declined to appear as "prosecutor" of the contempt charges (J.A. 237).[1] Accordingly, the district court entered an order on December 16, 1985, appointing William A. Curran as the "prosecuting attorney",

[1] That arrangement would now be prohibited in any event under this Court's intervening decision in *Young* v. *United States ex rel. Vuitton et Fils S.A.*, No. 85-1329 (May 26, 1987).

with "full authority" to prosecute the motion to adjudge respondents in contempt (J.A. 237-238). On January 6, 1986, in accordance with Fed. R. Crim. P. 42(b), Curran filed an application for an order to show cause why respondents should not be held in contempt (J.A. 3-5), and the court entered a show cause order on the same date (J.A. 31-32). After a hearing, the court held respondents in criminal contempt (Pet. App. A1-A22).

Respondents then appealed to the First Circuit, where Curran, designated as counsel for the "appellee," appeared in support of the judgments of contempt (Pet. App. A27).[2] A panel of the First Circuit reversed the convictions, on the ground that the temporary restraining order was transparently invalid under the First Amendment (Pet. App. A27-A46). The court of appeals, sitting en banc, modified the panel's opinion to make clear that even when a party believes that a judicial order is transparently invalid under the First Amendment, he must make a good faith effort to seek emergency relief from that order rather than simply disobey it (*id.* at A47-A49). However, the en banc court declined to apply that new rule to this case (*id.* at A48-A49).

By letters dated May 15 and June 1, 1987, Robert Parrillo, an associate of the attorney appointed by the district court, inquired whether the Department of Justice would authorize (or interpose an objection

[2] The Department of Justice filed a brief in the court of appeals on behalf of the United States as amicus curiae. That brief addressed only a narrow question of the applicability of the federal wiretap statute to matters arising before its enactment; the brief did not address the question of the validity of the contempt convictions under the First Amendment.

to) the filing of a petition for a writ of certiorari, for which Chief Judge Boyle had authorized the payment of costs. On July 1, 1987, the Solicitor General decided that the Department would not itself file a petition for a writ of certiorari seeking review of the First Circuit's decision. In addition, by telephone conversation and by letter from the Solicitor General dated July 2, 1987, this Office responded to the inquiries from the associate of the attorney appointed by the district court regarding his filing of a certiorari petition. See App., *infra*, 1a-2a. The Solicitor General observed in his letter that this Court had not resolved in its recent decision in *Young* v. *United States ex rel. Vuitton et Fils S.A.*, No. 85-1329 (May 26, 1987), whether the authorization of the Solicitor General is required in order for court-appointed counsel to file a petition for a writ of certiorari in a contempt case. The Solicitor General stated, however, that to the extent such authorization is necessary, he declined to grant it in this case.

Counsel appointed by the district court nevertheless filed a petition for a writ of certiorari, presumably based on his view that the authorization of the Solicitor General was not required. The Court granted that petition on October 5, 1987. The Solicitor General then decided to file a brief on behalf of the United States as amicus curiae, in order to present the views of the Department of Justice and the Executive Branch on the merits of the case.[3] In preparing that brief, we considered the question that the

[3] The Solicitor General's decision not to authorize the filing of a petition for a writ of certiorari to review the judgment of the en banc court of appeals of course did not constitute an endorsement of the disposition by that court, and there accordingly is no inconsistency between the Solicitor General's decision at the certiorari stage and his subsequent decision to file a brief as amicus curiae in support of the petitioner after the Court granted review on the merits. The Solicitor General often files amicus briefs on the merits in criminal cases in which review was granted on the basis of a certiorari petition filed by a State, even though the Solicitor General might have declined to seek review if the same issue had arisen in a federal criminal prosecution or collateral proceeding.

Solicitor General reserved in his July 2, 1987, letter and concluded that the authorization of the Solicitor General was not required in order for counsel appointed by the district court to file the petition for a writ of certiorari. Although the parties did not address that issue in the papers they filed at the certiorari stage, we informed the Court of our conclusion in summary form in footnote 2 of our amicus brief.

ARGUMENT

Respondents base their motion to dismiss on 28 U.S.C. 518(a), which provides that except where the Attorney General in a particular case directs otherwise, "the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court * * * in which the United States is interested." In respondents' view, this statute required the authorization of the Solicitor General before a petition for a writ of certiorari could be filed by William Curran, the attorney who was appointed by the district court to "prosecute" the charges of criminal contempt and who defended the convictions in the court of appeals. Although we tentatively expressed a similar view in our amicus brief in *Young* (at 2 n.1),[4] we have reexamined the question in light

[4] We stated in *Young* that that case "would appear to fall within the scope of 28 U.S.C. 518(a)" (U.S. *Young* Amicus

of this Court's opinion in *Young*. As we stated in our brief as amicus curiae in this case, we have concluded that the authorization of the Solicitor General was not required. We now set forth in more detail the reasons that led us to reach that conclusion.

1. Our analysis begins with the recognition that a person may be punished for contempt of a federal court, in violation of 18 U.S.C. 401, in either of two ways. In our view, only one of those two ways of proceeding is governed by the various statutes—including 28 U.S.C. 518(a)—that vest the Attorney General with control over litigation in which the United States is interested.

First, a criminal prosecution for contempt of court may be commenced in the same manner that a prosecution may be commenced for any other violation of a federal criminal law—that is, by indictment or information, as provided for in Fed. R. Crim. P. 7(a). See, *e.g.*, *United States* v. *Armstrong*, 781 F.2d 700, 703-704 (9th Cir. 1986); *United States* v. *Squartino*, 778 F.2d 734 (11th Cir. 1985); *United States* v. *Williams*, 622 F.2d 830, 837-838 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981); *United States* v. *Morales*, 566 F.2d 402, 404-406 (2d Cir. 1977). The prosecution of a criminal contempt action that is initiated in this manner is the responsibility of the Executive Branch, as an aspect of the President's duty to "take Care that the

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Br. 2 n.1). However, in order to assure that the Court would have the benefit of the arguments in support of the district court's appointment of interested private counsel in the *Young* case, the Solicitor General authorized the court-appointed counsel to appear in this Court on behalf of the respondent (which was identified in the caption as "United States ex rel. Vuitton et Fils").

Laws be faithfully executed." U.S. Const. Art. II, § 3; see *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976). By statute, such a prosecution must be conducted by the United States Attorney or other officer of the Department of Justice, under the supervision of the Attorney General. See 28 U.S.C. 516, 517, 519. In addition, and of particular relevance here, 28 U.S.C. 547 states that "[e]xcept as otherwise provided by law, each United States attorney, within his district, shall—(1) prosecute for all offenses against the United States * * * ." Proceedings in the courts of appeals that arise out of such criminal prosecutions likewise are the responsibility of the Attorney General and other officers of the Department of Justice under 28 U.S.C. 516-519. And if the case reaches this Court, 28 U.S.C. 518(a) requires that, unless the Attorney General directs otherwise, the Attorney General and the Solicitor General shall conduct and argue the case, since it clearly is one "in which the United States is interested" within the meaning of Section 518(a).

Second, unlike other criminal matters, contempt of court may be punished in proceedings that are initiated by the court itself under Fed. R. Crim. P. 42. If the United States Attorney declines the court's request to conduct the prosecution, the court may appoint or designate a private attorney to do so. The Court held in *Young* that the federal district courts "possess inherent authority to initiate contempt proceedings for disobedience to their orders, authority which necessarily encompasses the ability to appoint a private attorney to prosecute the contempt" (slip op. 5). The Court explained that the ability to punish contempts that the United States Attorney declines to prosecute is essential to the

preservation of—and is itself a proper aspect of—the " 'judicial power of the United States' " conferred on the courts by Article III (slip. op. 8, quoting *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911)). In the Court's view, the federal courts cannot be completely at the mercy of the Executive Branch in deciding whether contempt proceedings should be initiated, as would be the case if contempt could be punished only in a prosecution initiated by the United States Attorney (*Young*, slip op. 8, 13). Accordingly, the Court concluded that a court's ability to appoint a private attorney to "prosecute" a contempt action "satisfies the need for an independent means of self-protection, without which courts would be 'mere boards of arbitration whose judgments and decrees would be only advisory' " (*id.* at 8, quoting *Gompers*, 221 U.S. at 450).[5]

Thus, under *Young*, when a private attorney is appointed to "prosecute" a contempt action that was initiated by the court pursuant to its inherent authority, that attorney does not exercise "executive Power" within the meaning of Article II of the Constitution, and he therefore is not subject to the control of the President or the Attorney General in the performance of his duties. Instead, the court-appointed attorney merely assists the court in performing an aspect of the "judicial Power" conferred

[5] Consistent with the principle that " 'only "[t]he least possible power adequate to the end proposed" should be used in contempt cases' " (slip op. 12, quoting *United States* v. *Wilson*, 421 U.S. 309, 319 (1975), and *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821)), the Court further held that "a court ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied" (slip op. 13).

on it by Article III of the Constitution, and the proceedings therefore are subject at all times to the direction and control of the appointing court.[6] In this respect, the role of an attorney appointed by the court differs critically from that of a United States Attorney or other officer of the Department of Justice. The Court recognized this distinction in *Young* when it observed that the fact that contempt has come to be regarded as " 'a crime in the ordinary sense' " for purposes of the application of certain procedural protections (slip op. 11-12, quoting *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968)) "does not mean that any prosecution of contempt must now be considered an execution of the criminal law in which only the executive branch may engage" (slip op. 11).[7]

[6] It is for this reason that in *United States* v. *McKenzie*, 735 F.2d 907 (1984) (discussed at Mot. to Dismiss 11 n.11), the Fifth Circuit correctly held that the private attorneys appointed by the district court to prosecute charges of criminal contempt could not appeal the district court's order dismissing those charges.

[7] Rule 42(b) also provides that the United States Attorney may file an application for an order to show cause why the party should not be held in contempt. That course would be an alternative to filing an indictment or information where the district court refers the matter to the United States Attorney, as required by *Young*.

If the district court enters a show cause order in response to an application filed by the United States Attorney, the latter may assist the court further by prosecuting the contempt charges (to the extent that the assistance of a prosecutor is necessary). Cf. *Young*, slip op. 6. In such a case, the United States Attorney of course remains an officer and representative of the Executive Branch, under the direction of the Attorney General. Compare *Pennsylvania Bureau of Correction* v. *United States Marshals Service*, 474 U.S. 34, 36 n.1, 38 (1985). He may decline to participate or cease par-

This difference also is reflected in the relevant laws enacted by the First Congress. Contempt of court was not defined in the first criminal code as one of the ordinary criminal offenses against the United States (Act of Apr. 30, 1790, ch. 9, 1 Stat. 112), to be prosecuted by the United States district attorney pursuant to Section 35 of the Judiciary Act of 1789, ch. 20, 1 Stat. 92. Rather, Section 17 of the Judiciary Act of 1789 conferred directly on the courts themselves the "power * * * to punish * * * all contempts of authority in any cause or hearing before the same" (1 Stat. 83), just as that section conferred on the courts the power to regulate other internal matters by authorizing them to make "all necessary rules for the orderly conducting [of] business" (*ibid.*). Indeed, to this day, the basic contempt statute, 18 U.S.C. 401,[8] confers directly on the courts

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ticipating if his role in the proceedings conflicts with policies of the Department of Justice or specific instructions of the Attorney General. If that occurs, the court presumably may appoint private counsel to pursue the matter. Thus, where contempt proceedings are initiated by the issuance of a show cause order on the application of the United States Attorney under Rule 42(b), the proceedings constitute a cooperative undertaking by the Executive and Judicial Branches.

For similar reasons, respondents err in contending (Mot. to Dismiss 10 n.10) that under our view, if the conviction obtained by the United States Attorney in such a case was reversed on appeal, the district court would have the authority to require the Solicitor General to file a petition for a writ of certiorari to review the judgment of the court of appeals. The Solicitor General, not the district court, would have the authority under 28 U.S.C. 518(a) to decide whether the *Solicitor General* would file a certiorari petition. However, if the Solicitor General decided not to file a petition, it may be that the district court could appoint a private attorney to do so.

[8] 18 U.S.C. 401 is derived from the Act of Mar. 2, 1831, ch. 99, § 1, 4 Stat. 487-488. See U.S. Amicus Br. 10.

the power to punish the specified contempts of their authority.

Early in the Nation's history, contempts governed by Section 17 of the Judiciary Act of 1789 and by what is now 18 U.S.C. 401 were punished by the courts summarily, without the need for the assistance of a specially appointed attorney to present the evidence and otherwise "prosecute" the charges. Over the years, however, with the application to criminal contempt proceedings of most of the procedural protections that a defendant enjoys in other criminal cases (see *Young*, slip op. 11-12), judicially initiated contempt proceedings increasingly came to resemble traditional criminal prosecutions in their form.[9] And because of the practicalities of such non-summary proceedings, it became necessary for the court to appoint an attorney to assist it by assuming the role of a "prosecutor." But this similarity in form should not be permitted to obscure the fact that a private "prosecuting" attorney in a contempt proceeding initiated by the court derives his authority from the court, not from another Branch, and he exercises a species of the judicial power that authorizes a court to punish contempts *unilaterally*. By contrast, the prosecuting attorney in a contempt proceeding initiated by indictment or information acts as the representative of the Executive Branch, which has invoked its independent constitutional and statutory power to file a criminal prosecution.

Against this background, we believe that the statutes, including 28 U.S.C. 518(a), that vest the Attor-

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[9] Indeed, as noted above (see page 6, *supra*), contempt is now on occasion prosecuted by the United States Attorney on the basis of an indictment, in the same manner as other crimes.

ney General with control over the conduct of litigation in which the United States is interested were not intended to apply to contempt proceedings that are initiated unilaterally by a court in the exercise of its Article III power and are "prosecuted" by an attorney appointed by the court. Indeed, the Court in *Young* sustained the power of a court to appoint a private attorney to prosecute charges of criminal contempt notwithstanding that 28 U.S.C. 516 provides that all litigation in which the United States or an officer thereof is a party or "is interested" is "reserved to officers of the Department of Justice, under the direction of the Attorney General," and that 28 U.S.C. 547(1) specifically provides that the United States Attorney shall "prosecute for all offenses against the United States" within his district.[10] The necessary import of *Young* is that despite the broad language of these statutes, they do not apply to criminal contempt proceedings that are initiated by the court under Rule 42(b) and are "prosecuted" under its control.[11]

In our view, it follows that 28 U.S.C. 518(a), which provides that the Attorney General and the Solicitor General shall conduct appeals in this Court "in which the United States is interested," does not

[10] Section 516 and related statutes were not specifically discussed by the Court in *Young*, but the Court's opinion makes clear its understanding that the conduct of criminal prosecutions and other litigation ordinarily is the responsibility of Executive officials. See slip op. 13.

[11] Compare *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1261, 1266 (11th Cir.), cert. denied, 469 U.S. 884 (1984); *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 366 F. Supp. 51, 56 (D.D.C. 1973).

apply to appeals arising out of contempt proceedings that were initiated and prosecuted in the lower courts under the control of the district court, rather than the Attorney General. Instead, 28 U.S.C. 518(a), like the other statutes that vest the Attorney General with exclusive control over litigation, applies to cases in which the United States is "interested" by virtue of the constitutional and statutory responsibilities of the Executive Branch—the Branch in which the Attorney General serves. Cf. *ICC* v. *Southern Ry., Co.*, 543 F.2d 534, 536 (5th Cir. 1976) (Section 516 "not only centralizes responsibility for the conduct of public litigation but enables the President, through the Attorney General, to supervise the various policies of the executive branch").[12] This construction is consistent with the decisions of this Court upon which respondents rely in support of their argument that the Solicitor General has authority over the instant case in this Court (see Mot. to Dismiss 5-7), because those decisions concerned litigation in which the United States Attorney had appeared in the lower courts pursuant to the Executive Branch's responsibility under Article II of the Constitution to represent the interests of the United States in litigation against private parties. See *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458 (1868); *United States* v. *Winston*, 170 U.S. 522, 524 (1898); accord *The Gray Jacket*, 72 U.S. (5 Wall.) 370, 371 (1867).[13]

[12] We do not suggest, of course, that the Attorney General and other officers of the Department of Justice are not authorized by 28 U.S.C. 516 and related statutes to represent the officers or interests of the Legislative and Judicial Branches in appropriate circumstances.

[13] By contrast, judges and entities of the Judicial Branch have on occasion appeared in this Court through private

2. Respondents do not discuss the various statutes that vest the Attorney General and United States Attorneys with control over criminal prosecutions and other litigation in the lower courts; nor do they acknowledge that this Court in *Young* sustained the power of a district court to appoint an attorney to prosecute charges of criminal contempt despite the existence of those statutes. Respondents thereby fail to appreciate the obstacle *Young* poses to their argument that the equivalent statute applicable to cases in this Court, 28 U.S.C. 518(a), bars such a court-appointed attorney from petitioning for a writ of certiorari without the approval of the Solicitor General.

Respondents in fact acknowledge (Mot. to Dismiss 9) that "there is, to be sure, a case to be made that, in light of this Court's conclusion in *Young* that it is essential for the judiciary to be empowered to punish disobedience to judicial orders 'without complete dependence on the other branches' (107 S.Ct. at 2131), a district court should be permitted to determine on its own when and whether to seek review by this Court." Respondents' only answer to this telling concession is a policy objection that in a case such as this, the "United States" (which is how the "petitioner" is denominated in this Court) for whom the attorney appointed by the district court purports to speak is only the Judicial Branch—and even then is only the single district judge who appointed the attorney, since the Judicial Branch has no central repository such as the Solicitor General to screen cases and ensure the presentation of a uniform position. This objection is insubstantial.

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counsel, rather than the Attorney General or the Solicitor General, in cases involving their official responsibilities. See, *e.g.*, *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 657 (1978); *Chandler* v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74, 75 (1970); *Will* v. *United States*, 389 U.S. 90, 91 (1967).

Because the contempt proceedings in question were initiated by a single district judge who was not subject to the sort of centralized control that the Attorney General exercises over regular criminal prosecutions, there is nothing anomalous about permitting that single district judge to decide whether to authorize or direct the attorney he appointed to seek review in this Court. In addition, respondents ignore the fact that this Court obviously is in a position to assure centralized control over its own review of appellate decisions in court-initiated contempt cases, through the exercise of its discretionary authority to grant or deny the petition for a writ of certiorari filed by the court-appointed attorney. That role is consistent with the Court's general willingness to exercise its supervisory authority over contempt proceedings in the lower federal courts. See *Young*, slip op. 20, and cases cited. The burden of performing that screening role should not prove to be substantial, because the requirement under *Young* that contempt charges first be referred to the United States Attorney should minimize the number of cases in which the district courts find it necessary to appoint private counsel who might ultimately invoke this Court's certiorari jurisdiction.

Furthermore, respondents' argument for centralized, Executive Branch control over the certiorari decision in a case prosecuted by a court-appointed attorney is in tension with the Court's conclusion in *Young* that a court must be allowed to appoint a private attorney in the first place in order to assure that the courts are not completely at the mercy of the Execu-

tive Branch in vindicating their authority. *Young*, slip op. 8, 13. Vesting the Department of Justice with control over the certiorari decision would be especially anomalous since, after *Young*, contempt actions prosecuted by private attorneys will be ones for which the Department of Justice specifically declined to assume any responsibility when they were referred to the Department at the outset.[14]

It also is significant that, contrary to respondents' suggestion (Mot. to Dismiss 10-11), their construction of 28 U.S.C. 518(a) would not merely require the Solicitor General's authorization for the court-appointed attorney to file a certiorari petition in those cases in which an appellate court reversed the contempt conviction. It also would require the Solicitor General to exercise control over briefs filed by the court-appointed attorney in cases in which the court of appeals affirmed the conviction and the contemnor then sought review in this Court. It therefore would be possible for the Solicitor General to confess error in such a case or otherwise prevent the private attorney from making arguments in support of the conviction that had been accepted by both courts below. The exercise of such control by Executive Branch officials would raise the same concern regarding an "affront to judicial dignity" that respondents concede (Mot. to Dismiss 10-11) was the basis for the Court's conclusion in *Young* that the ability of the federal courts

[14] It is particularly ironic for respondents to advance this argument in a case in which the Solicitor General specifically declined to authorize the filing of a certiorari petition by the court-appointed attorney but the Court nevertheless granted a petition that was filed by the attorney appointed by the district court.

to punish contempts of their authority should not be entirely at the mercy of the Executive Branch.[15]

[15] Respondents base their motion to dismiss solely on the failure of the court-appointed attorney to obtain the authorization of the Solicitor General to file the certiorari petition. They do not assert a lack of "standing" to seek review in this Court, and we do not believe such an assertion should be sustained. Under 28 U.S.C. 1254(1), "*any* party to *any* * * * criminal case" in a court of appeals may file a petition for a writ of certiorari (emphasis added). This language manifests an intention to permit review of all decisions rendered by the courts of appeals. Moreover, the Court has observed that criminal contempt proceedings arising out of civil litigation " 'are between the public and the defendant' " (*Young*, slip op. 16 (quoting *Gompers*, 221 U.S. at 445)). To be sure, where, as here, the proceedings are initiated by the court unilaterally, the United States, as such, is not formally made a "party"—as evidenced by the caption of this case in the lower courts ("*In the Matter of* * * *" (Pet. App. A1, A27)). Nevertheless, the Court in *Young* held that such proceedings constitute a proper exercise of the judicial power under Article III, and the attorney appointed by the district court assures an adversarial presentation of views. Cf. *INS* v. *Chadha*, 462 U.S. 919, 939-940 (1983). In these circumstances, the interests of the appointing court in vindicating its authority would appear to be sufficient to support the conclusion that this Court's jurisdiction has been invoked by a "party" within the meaning of 28 U.S.C. 1254(1).

However, contrary to petitioner's suggestion (Objection to Mot. to Dismiss 2 n.1), we see no reason why the caption of the case in this Court should be changed from what it was in the courts below ("*In the Matter of* * * *"). This Court's Rules do not require the caption to include two opposing parties where the caption below did not do so, and the caption below in this case correctly reflected the unilateral nature of contempt proceedings that are initiated by the court through the issuance of a show cause order. But if the Court nevertheless believes that the case should be captioned in a manner that indicates the existence of opposing interests or "parties," we suggest use of the form "*United States ex rel.* * * *," as

CONCLUSION

The motion to dismiss the writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JANUARY 1988

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in *Young*, to distinguish such cases from those in which a prosecution is initiated by the United States Attorney by indictment or information.

APPENDIX

[SEAL]

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

July 2, 1987

Robert D. Parrillo, Esquire
Hanson, Curran & Parks
1210 Turks Head Building
Providence, Rhode Island 02903-2274

Re: In The Matter Of Application To Adjudge The Providence Journal Company And Its Executive Director, Charles M. Hauser, In Criminal Contempt, No. 85-617

Dear Mr. Parrillo:

Your letters to Douglas Letter of the Civil Division of this Department regarding the above-captioned case have been referred to me for a response.

In its recent decision in *Young* v. *United States ex rel. Vuitton et Fils*, No. 85-1329 (May 26, 1987), the Supreme Court did not resolve the question whether the authorization of the Solicitor General is required in order for private counsel, who has been appointed to present charges of criminal contempt in the district court under Fed. R. Crim. P. 42(b), to file a petition for a writ of certiorari or otherwise appear on behalf of the United States in the Supreme Court. To the extent that such authorization is

necessary, however, I decline to authorize such a filing or appearance in this particular case.

Thank you for your consideration in bringing this matter to our attention.

Sincerely,

/s/ Charles Fried
CHARLES FRIED
Solicitor General

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